BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JOHN BROWN	)	
Claimant	)	
V.	)	
	)	Docket No. 1,071,316
GARNER REMODELING AND HOME IMPROVEMENT, INC.	)	
	)	
Respondent	)	
AND	)	
	)	
OWNERS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the August 13, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Rebecca Sanders.

APPEARANCES

Paul D. Post, of Topeka, Kansas, appeared for the claimant. Matthew H. Hogan, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from August 12, 2015, with exhibits attached and the documents of record filed with the Division.

ISSUES

The ALJ found claimant failed to sustain his burden of proof that appropriate notice of accident was provided within 20 days of the date of accident and denied claimant's preliminary hearing requests.

Claimant appeals, arguing the ALJ's Order should be reversed. Claimant argues he met with repetitive trauma in the course of his employment with respondent on April 18, 2014. He contends he gave notice of injury to his hands on at least three occasions by

showing supervisors his swollen hands and providing medical records within 10 days of his diagnosis.

Respondent contends the ALJ's Order should be affirmed as claimant failed to satisfy his burden under K.S.A. 44-520 by not providing timely notice of the alleged injury until September 2014, when the Application for Hearing was received.

Claimant raises the following issues on appeal:

1. Did claimant give timely notice of injury to respondent?

2. Did respondent have actual knowledge of the claimed injury so as to excuse notice under K.S.A. 44-520(b)?

FINDINGS OF FACT

Claimant, a carpenter for 25 to 30 years, is currently working for local union 1445. Claimant worked for respondent, Garner Remodeling and Home Improvement, Inc., for two months, dismantling burnt homes and making them livable. This consisted of tearing out burnt walls, floors, and roofs and replacing them with new ones. During his employment claimant performed these duties on two homes. Claimant testified that the second house he worked on required vigorous work to replace the roof and to remove water-soaked items from the structure.

Claimant testified that toward the end of work on the first home claimant started to develop swelling in his hands. Claimant testified he reported this to Chad Schooler, a foreman for respondent.[1] Claimant testified that he started taking Mondays off because he was experiencing slight difficulty and minor pain with normal use of his hands. Claimant did not think much about it at the time because he related it to what happens with the hands of those working in construction. Claimant testified he had swelling in both hands and had trouble making fists. Claimant denied any serious problems with his hands prior to working for respondent.

When respondent's employees moved to the second home, one of the workers named Rob asked to see claimant's hands and, as he did, claimant experienced a streak of pain through his left index finger and from his knuckle toward his wrist. Claimant testified that, while the pain was in his left hand, the swelling was in both hands. Claimant testified that Rob told him he needed to see a doctor. Claimant went to Med-Assist upon the suggestion of Mr. Schooler. Later claimant acknowledged Mr. Schooler may have just suggested he see a doctor. Med-Assist was not specifically mentioned.

[1] P.H. Trans. at 13.

Claimant testified he never specifically reported to respondent that his bilateral hand problems were work-related and no one at respondent ever relayed this to him. Claimant acknowledged he was told to report any injury, no matter how minor, because it could turn into something worse. A report could be made to anyone in a position above claimant, i.e. a foreman, supervisor or owner.

> Q. What were you trying to convey to Chad insofar as whether your hands were in any way related to the work activities?
>
> A. Uh, I showed him I had swelling in my hands. And he says -- and I said, I've never had a problems with this, you know. And I said, you know, I don't think that day, I think it was the next day or late that day. I showed him that my hands were swelling and I showed swelling. And we both agreed it was from -- in the conversation, neither one of us directly said, okay, your hands were just fine prior to Garner and now they're swollen; it's due to Garner. We both agreed that the work I was doing there and I hadn't worked prior to Garner for so long that my hands weren't used to it. It wasn't that we said, okay, your hands are injured from this job. We just think that's what it was.
>
> Q. All right.
>
> A. Okay. And I continued to work but I had to take off Mondays because I couldn't grip. I told them over the phone -- I talked to Chad over the phone. I would call him. I had his cell number, which I called him directly on Mondays and took off work.
>
> Q. So if I understand it, your impression about the discussions you had were that it was work related?
>
> A. Well, yeah. We both agreed that it was.
>
> Q. Okay.
>
> A. You know, he understood --
>
> . . .
>
> Q. You said he agreed. How did he express that agreement?
>
> A. He -- knowledge that I hadn't been working prior to Garner; that I have dealt with so many lay-offs, the company was aware of that; that I really haven't had any employment. And he brought it to my attention that, you know, you're just having swelling problems here because you haven't been working.[2]

[2] *Id.* at 46-47.

Claimant went to Med-Assist on April 14, 2014, and had x-rays taken. Apparently Mr. Schooler was there for medical reasons of his own. Claimant alleges Mr. Schooler stood in the doorway and listened as the results of the x-rays were read to claimant. Claimant testified the doctor, Ronald Huffman, M.D., told him he had a spur on his thumb and he should get out of the construction business. Claimant was diagnosed with bilateral tenosynovitis in his hands and wrists and probable early carpal tunnel syndrome in his right wrist. The medical report indicates hand swelling bilaterally, but states no known injury. Claimant declined pain medication offered to him at this time. Claimant stopped working for respondent on April 18, 2014. Claimant indicated he informed Mr. Schooler he was quitting because of the problems with his hands.

At some point, Kevin Garner, respondent's owner, noticed claimant's hands. When asked about it, claimant told Mr. Garner he had put a new alternator on his son's truck. Claimant acknowledged that he did not tell Mr. Garner his hand condition was related to his work with respondent.

Claimant met with Dr. Huffman again on May 6, 2014, as part of verification that he was unable to work because of his hands and also in relation to his child support case.

Claimant was at Med-Assist again on February 12, 2015, expressing complaints of shooting pain in both hands. Claimant displayed negative Tinel's and Phalen's tests over the right wrist, with some tingling over the left median nerve. Claimant began taking pain pills at this time because he thought it would take the edge off of his pain and allow him to sleep better.

On March 15, 2015, claimant was examined, at the request of his attorney, by board certified disability evaluating physician, Peter V. Bieri, M.D. Claimant was diagnosed with bilateral overuse syndrome and tenosynovitis, which, based upon claimant's history, the doctor attributed to claimant's work. A formal orthopedic consultation with appropriate diagnostic and treatment interventions was recommended.

On June 6, 2015, claimant was referred by Disability Determination Services to Tim Roberts, D.O., who examined claimant for problems related to his hands, back and a problem with insomnia. The hand examination indicated normal Tinel's and Phalen's tests with grip strength and dexterity preserved. The doctor found no evidence of any functional impairment.

Mr. Schooler testified he has worked for respondent for 23½ years. Mr. Schooler testified he saw claimant every morning on the job, and actually worked with him three or four days. He indicated remembering claimant coming to him one day in the shop and showing him a little swelling in his hands. Mr. Schooler also indicated that on a couple of occasions claimant was asked how his hands were and claimant would say they were still a little swollen. Claimant gave no reason for the swelling and did not relate it to his work.

Mr. Schooler testified he asked claimant about the cause and told claimant to drink more water.

Mr. Schooler admits he was at Med-Assist at the same time as claimant and even talked to him, but denies being in the room when claimant was talking with the doctor. He admits he heard the two talking while he was in the next room, but he could not understand what they were saying. He asked the doctor in the lobby what was wrong with claimant, but the doctor could not say. Mr. Schooler testified he did get the doctor to admit that claimant was drunk. It is Mr. Schooler's opinion that claimant drinks too much and that is why his hands swell. Medical records attached to the preliminary hearing indicate claimant has been counseled about alcohol consumption.

Mr. Schooler testified that the company has a policy manual that requires a work-related injury be reported to Sue in the office. He has no knowledge of claimant reporting a work injury to any other employee.

Mary Susan Artzer, office manager for respondent, has worked for respondent for 11 years. Her job duties include answering the phones, setting schedules, maintaining the calendar and taking information for the workers on the jobs.

Ms. Artzer testified the employee Policies and Procedures Manual[3], says the office is to be notified immediately of any on-the-job injury. If the accident is life threatening, the injury is reported after going to the hospital. The accident reporting policy page provides a phone number at the office where accidents are to be reported. Respondent's Exhibit C included a management policy statement page signed by claimant. Ms. Artzer testified there are three other people in the office besides herself, Kevin, Jennifer, the bookkeeper and Walt, whom she identified as being second in command. Generally, most of the reports of accident are taken by her as she is the primary person on the phones.

Ms. Artzer testified she believes claimant began working for respondent on February 26, 2014, and his last day of work was April 18, 2014. Claimant came in to pick up his last check on April 23, 2014. Ms. Artzer testified that at no time did claimant report a work injury to her. The only thing claimant gave her were some results from testing done on his hands when he told her he could no longer work for the company because of his hands. She testified claimant told her his hand problems had nothing to do with his work. Respondent's Exhibit D to the preliminary hearing is Ms. Artzer's handwritten note regarding claimant's April 23, 2014, visit to respondent's office when he brought in the doctors note. The note indicates claimant advised her that his hand problems were not work-related.

[3] *Id.*, Resp. Ex. C.

Ms. Artzer acknowledged that, as far as she knew, there was no policy for how someone would report a condition from repetitive activities on-the-job.

Mr. Garner testified that at no point in time did claimant ever come to him and report suffering an injury, having a problem, an incident or anything while on the job. He indicated that no one came to him to report claimant having an injury. He did hear claimant was having problems with his hands, but claimant never discussed it with him. He testified claimant was already gone from employment when he heard about the hand problems.

Mr. Garner testified there were complaints that claimant smelled of alcohol. He looked into it, smelled alcohol on claimant's breath on one occasion and talked to claimant. Shortly after, claimant left work. Mr. Garner never had claimant tested so he could not be sure it was alcohol or something else that he smelled on claimant. Approximately three weeks after claimant left his employment, when they learned claimant was filing a workers compensation claim, claimant was called in to fill out paperwork for the insurance company. This was the first time Mr. Garner learned claimant was claiming a work-related injury.

Claimant was recalled as a witness at the end of the preliminary hearing. He was asked about contacting respondent to inquire about workers compensation paperwork. Claimant testified it would have been sometime after he contacted his attorney. Claimant described a conversation he had with an office secretary regarding whether his hands were the result of work activity. This conversation occurred at a time different from the April 23, 2014, date when he came to collect his last paycheck. Claimant acknowledged he never discussed his hand problems with Ms. Artzer.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-501b(b)(c) states:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508(e) states:

> (e) "Repetitive trauma'' refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the

> injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury.
> "Repetitive trauma'' shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
> (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work related; or
> (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.
> In no case shall the date of accident be later than the last date worked.

The ALJ determined claimant failed to give timely notice of the repetitive trauma suffered while working for respondent. In order to determine whether notice is timely, the date of the injury by repetitive trauma must be established. In this instance, claimant was not taken off work or placed on modified or restricted duty by a physician due to the repetitive trauma. Claimant testified he was advised by Dr. Huffman that his condition was work-related on April 14, 2014. However, the medical records from Dr. Huffman dated April 14, 2014, indicate bilateral hand pain and swelling, but with no known injury. From this record, the date of accident appears to be claimant's last day worked on April 18, 2014.

K.S.A. 2013 Supp. 44-520 states:

> (a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
> (A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;
> (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
> (C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.
> Notice may be given orally or in writing.
> (2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not

> designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.
> (3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.
> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
> (b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury;
> (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.
> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

Claimant's last day worked for respondent and the determined date of accident was April 18, 2014. Ten days from the date of accident would be April 28, 2014. Any notice received after that date would fail to satisfy the requirements of K.S.A. 2013 Supp. 44-520. Claimant contends he told Mr. Schooler about his hands and that they were related to his work for respondent. Mr. Schooler disputes this claim, contending claimant never advised the minor swelling in his hands was work-related. Additionally, the note created by Ms. Artzer contemporaneous with claimant providing the medical report from Dr. Huffman indicates claimant denied a work connection with his hand problems. Finally, Dr. Huffman's medical records from April 14, 2014, state there was no known injury, with no work connection discussed or claimed. Mr. Garner testified that workers compensation paperwork was completed approximately three weeks after claimant left his employment, after respondent was advised claimant was making a work injury claim.

This Board Member finds claimant failed to prove that he provided timely notice of his alleged series of trauma injuries to respondent or that respondent or respondent's duly authorized agent had actual knowledge of the claimed injury. The notice statute requires the information about the injury include particulars of the injury. In this instance, claimant made vague references to hand swelling while denying a work connection to more than one person. In fact, when talking to respondent's owner, Mr. Garner, claimant only referenced some automotive work done on claimant's son's car. The Order of the ALJ denying claimant workers compensation benefits is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[4] Moreover, this

[4] K.S.A. 2013 Supp. 44-534a.

review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant failed to prove that he provided timely notice to respondent of his alleged series of repetitive trauma injuries or that respondent or its duly authorized agent had actual knowledge of the injury.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated August 13, 2015, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2015.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

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Rebecca Sanders, Administrative Law Judge